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ARTICLE: Arrgh! Hollywood Targets Internet Piracy

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SUMMARY:

... Despite the well-publicized litigation in *A&M Records, Inc. v. Napster, Inc.*, web-surfers in the United States and around the world continue to share copyrighted digital media files such as MP3 files. ... The music industry has filed numerous suits against ISPs and individual users in an effort to stop illegal downloading and demonstrate its resolve. ... The first breakthrough was the well-publicized injunction against Napster, Inc., which led to Napster's eventual downfall. ... Additionally, the court found that Napster had the ability to supervise and stop the illegal activity, despite its "lack of user control" argument. ... Second, the ability to download movies and then transfer and store the media decreases studio revenue. ... Despite technological "advances," many of those engaged in movie piracy feel that Hollywood has little to lose from this illegal downloading compared to the effects endured by the recording industry. ... Accordingly, the MPAA has produced several theatrical trailers, exhibiting various behind-the-scene workers discussing their jobs and the effects movie piracy will have on themselves and over 500,000 others in the field if illegal downloading continues. ... To date, Hollywood's efforts to fight illegal downloading have not matched those of the recording industry--perhaps a wise move. ...

HIGHLIGHT: [I] *Abstract:* As technology advances, the threat of rampant and unprecedented theft of digital media continues to grow. The music industry has already faced, and continues to face, this threat, but has largely failed in defending musicians' intellectual property.

[II] With the advent and increasing popularity of high-speed Internet connections, Hollywood faces the same dilemma and is fighting back. As a *Time* magazine writer recently noted,

Studio executives, no strangers to melodrama, have begun to talk about movie piracy the way FBI agents talk about terrorism: they watch the Web for "chatter," they embed films with hidden "fingerprints," and they speak without irony about "changing hearts and minds." They even use night-vision goggles. It's not going too far to say they are completely paranoid, which doesn't mean they are wrong. n3

[III] Indeed, the battle rages. But is guerilla warfare the best method to fight a "menace" that may represent Hollywood's greatest opportunity? To ensure success on ongoing profitability, the movie industry must mind the lessons of the music industry's failures, forge its own path, and embrace the wonder that is the Internet. This article examines the music industry's efforts to fight e-piracy, discusses Hollywood's limited efforts and perhaps Hollywood's only remaining viable alternative in fighting, or embracing, this growing menace.

TEXT:

I. INTRODUCTION

The Internet has changed the world. Never before has mankind communicated on such an immense scale or had endless information at its fingertips. But with advancement comes the specter of unprecedented exploitation.

Underscoring the lack, or inadequacy, of Internet regulation, Internet users circumvent established laws, notably the Copyright Act of 1976, n4 with impunity. Despite the well-publicized litigation in *A&M Records, Inc. v. Napster, Inc.*, n5 web-surfers in the United States and around the world continue to share copyrighted digital media files such as MP3 files. n6

The e-pirate's adventure, however, is growing riskier as the music and movie industries are increasingly aiming their cannons away from Internet server providers ("ISPs") and taking aim at minors and unsuspecting parents. As the above quote suggests, e-piracy is prompting the music and movie industries to take drastic measures to fend off this burgeoning threat. Technology has made it possible to pirate both movies and music in little time, with little effort and with little to no quality distortion. According to both industries, ever-changing and advancing technological "innovations" are decreasing sales and costing jobs. n7 As a result of e-piracy, the music industry lost approximately \$ 2.4 billion in 2003, and the film industry loses approximately \$ 3 billion every year. n8

E-piracy is clearly theft. For many, however, downloading music and movies onto one's private computer does not pain the conscience as does walking out of a store with a CD or DVD under one's coat. Accordingly, the music industry is shifting its attention towards litigation, education and efficient profit-making services. However, convincing Internet users that downloading violates copyright law (a fact lost on many pre-teen or teenaged e-pirates) and is no different than pilfering compact discs from one's favorite music shop, is an immense challenge. The process is slow, and meanwhile the industries and artists continue to lose money. n9 Fortunately for both industries, Congress is aware of the rampant lawlessness and is acting, albeit limitedly, in response. n10 The music industry (and to a lesser degree Hollywood) is not sitting idly by while its coffer is raided; it continues to materialize its educational and commercial efforts against piracy. The music industry has filed numerous suits against ISPs and individual users in an effort to stop illegal downloading and demonstrate its resolve. n11 In contrast, Hollywood's litigation efforts are moving more slowly, perhaps because technological developments have only recently allowed DVD downloading with ease and speed. n12 In 2003, 4.3 million households in North America upgraded to broadband, n13 and from March 2002 to March 2003, the percentage of American households with high-speed connections rose from 21% to 31%. n14 Currently, 39% of all adult Internet users have high-speed Internet access at home. n15

Hollywood has the opportunity to learn valuable lessons about combating the negative effects of e-commerce, and its potential financial benefits, from the music industry's failed model. Although the movie industry launched nearly 3000 private investigations across the United States in 2003, n16 Hollywood has failed to establish a unified front in the fight against e-piracy. n17 In order to ensure success, Hollywood must forge its own path while minding the mistakes and missed opportunities of the music industry. Hollywood must view the Internet as an opportunity to be exploited, and not waste valuable resources and squander public goodwill in its jealous effort to protect the property rights of artists.

II. STEMMING THE TIDE: COPYRIGHT LAW

To promote the arts and sciences, the U.S. Constitution provides intellectual property creators with exclusive rights to their works for a limited duration. n18 To further effectuate the Constitution's purpose, the Copyright Act of 1976 ("Copyright Act") provides that a copyright lasts for the artist's lifetime plus seventy years. n19 The copyright owner may control certain uses of his work n20 and can bring legal action if this copyright is violated. n21 Remedies for copyright violations include injunctions, monetary damages and criminal penalties. n22 The Copyright Act, however, provides exceptions for uses in fields such as education and research. n23

In the last decade, the Copyright Act has been amended to include provisions that focus on digital piracy. n24 In 1997, the aptly-named No Electronic Theft Act ("NETA") imposed criminal liability on providers of free access to copyrighted works. n25 Although NETA originally penalized only those who realized commercial advantage or private financial gain, it currently penalizes those who merely provide access. n26

The Copyright Act's second amendment, 1998's Digital Millennium Copyright Act ("DMCA"), n27 provides greater protection against infringement accomplished through encryption circumvention. n28 The DMCA enacted following

the adoption of the World Intellectual Property Organization Copyright Treatyⁿ²⁹ and aids the fight against recent technological developments that provide access to digital media via digital code breaking, including various DVD copying applications.ⁿ³⁰ The DMCA penalizes efforts to "circumvent a technological measure that effectively controls access to a work protected [by United States Copyright Law]."ⁿ³¹ Additionally it is unlawful under the DMCA to "manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that . . . is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a [protected] work."ⁿ³² For repeat offenders, the DMCA imposes fines of up to \$ 1 million and prison terms up to ten years.ⁿ³³ Since its passage, the DMCA has become an important, hotly-litigated, and repeatedly contested weapon against copyright infringement.ⁿ³⁴

Additionally, the DMCA's subpoena provision has been used to identify individual copyright violators by commandeering ISPs' user IP lists.ⁿ³⁵ However, the *Verizon* decision in late 2003, discussed below, dealt a serious blow to the music industry's effort to identify and pursue alleged violators.

III. THE MUSIC INDUSTRY FIGHTS BACK

A. Direct Hit! - *A&M Records, Inc. v. Napster, Inc.*

The recording industry began its attack by seeking preliminary injunctions against sites that made copyrighted music available to web users.ⁿ³⁶ The first breakthrough was the well-publicized injunction against Napster, Inc.,ⁿ³⁷ which led to Napster's eventual downfall. Napster's website allowed users to download music from Napster-run "host users" for free.ⁿ³⁸ Napster's server software enabled users to search and locate the MP3 files of other users.ⁿ³⁹ It then communicated the Internet address of the "host user" to the requesting user, and this connection allowed users to download directly from the other's computer, a process called "peer-to-peer" ("P2P") networking.ⁿ⁴⁰ In 2001, A&M Records, Inc. ("A&M") filed suit against Napster, alleging contributory and vicarious copyright infringement, and sought a preliminary injunction.ⁿ⁴¹

First, A&M claimed that Napster was liable for contributory copyright infringement because Napster not only knew its users were using its software to illegally download copyrighted music, but it facilitated such conduct.ⁿ⁴² Second, A&M claimed that Napster was vicariously liable for infringement.ⁿ⁴³

To be contributively liable for infringement, Napster had to "'know or have reason to know' of direct infringement" by its users and contribute to such conduct.ⁿ⁴⁴ The court found that Napster had both actual and constructive knowledge of the illegal activity.ⁿ⁴⁵ Such "actual" knowledge was based largely on a memo written by co-founder Sean Parker, emphasizing Napster's "'need to remain ignorant of users' real names and IP addresses 'since they are exchanging pirated music.'"ⁿ⁴⁶ Additionally, the Recording Industry Association of America ("RIAA") previously informed Napster that more than 12,000 copyrighted songs were available on Napster's site.ⁿ⁴⁷ "Constructive" knowledge was demonstrated by both the fact that Napster executives themselves actively downloaded music as well as Napster's promotion of copyrighted works on its site.ⁿ⁴⁸ Accordingly, the court concluded that Napster had knowledge of direct infringement, and the court found Napster contributively liable for infringement for failing to halt such conduct.ⁿ⁴⁹ The court noted that without Napster, its users would be unable to find and download copyrighted music it made available, thus satisfying the second element: contributing to the infringing conduct.ⁿ⁵⁰

To be liable for vicarious infringement, Napster must have possessed the "'right and ability'" to supervise its users and must have had a financial interest in the activity.ⁿ⁵¹ The court found that Napster's customers were attracted to free copyrighted music facilitated through its site, and as its customer roster increased, so did its profits.ⁿ⁵² Thus, Napster benefited financially.ⁿ⁵³ Additionally, the court found that Napster had the ability to supervise and stop the illegal activity,ⁿ⁵⁴ despite its "lack of user control" argument.ⁿ⁵⁵ On its website, Napster affirmed its "'right to refuse service and terminate accounts in [its] discretion, including, but not limited to, if Napster believes that user conduct violates applicable law . . . or for any reason in Napster's sole discretion, with or without cause.'"ⁿ⁵⁶ Accordingly, Napster was found vicariously liable.ⁿ⁵⁷

Napster defended its actions through the Copyright Act's "Fair Use Doctrine,"ⁿ⁵⁸ which allows use of copyrighted works for certain purposes, including criticism, teaching, and research.ⁿ⁵⁹ In evaluating the doctrine's applicability, courts must examine: (1) the use's purpose and character-- whether commercial or educational; (2) the "nature of the

copyrighted work"; (3) "the amount and substantiality of the portion of used"; and (4) the effect upon the potential market. n60

The court rejected Napster's fair use argument, holding that merely putting a work into a different format (i.e. transforming songs to a downloadable format) is not "fair use." n61 Moreover, the copyrighted work was used for commercial, rather than personal, purposes. n62 Additionally, when analyzed with respect to market effect, Napster harmed the market by reducing music sales and preventing the music industry from succeeding online. n63 After rejecting Napster's arguments, and finding it liable for contributory and vicarious infringement, the court enjoined Napster's operations based on A&M's showing of likelihood of success and irreparable harm if the conduct continued. n64

In 2001, the Court of Appeals for the Ninth Circuit upheld the lower court's decision and ruled that any copyrighted works had to be removed from Napster's site. n65 This ruling prompted musicians such as Metallica to file complaints against Napster demanding removal of their music. n66 Later that year, the once-mighty Napster was forced to shut down its site. n67

After its shut down in June 2001, Napster collaborated with MusicNet to make its music available through subscription services. n68 However, in 2002, the company filed for Chapter 11 bankruptcy and was sold to BMG for \$ 8 million. n69

While the *Napster* holding appeared to deliver the *coup de grace* to ISPs that store and distribute copyrighted works, in the face of providers that utilize the P2P model, its applicability has been limited.

B. Return Fire! - *MGM, Inc. v. Grokster, Ltd.*

In *MGM, Inc. v. Grokster, Ltd.*, the court faced essentially the same issue posed in *Napster*: whether the defendants were liable for contributory or vicarious copyright infringement. n70 However, Grokster, Ltd. ("Grokster") and StreamCast Networks, Inc. ("StreamCast"), distributors of Morpheus software, avoided liability due to their loose control over users' conduct. n71

Grokster, like Napster, provides downloadable software. n72 In contrast to Napster, however, Grokster's role ends once a user is connected to the network, as the user then shares files via P2P networking. n73 Moreover, when users search and transfer files using Grokster software, they do so without utilizing Grokster computers. n74 Thus, when a user logs off, the user's music is no longer available. n75 This severance allows Grokster and StreamCast to remain ignorant as to what music is available at any given time. n76 If Grokster shuts down, users can still share files with no interruption. n77

Although the *Grokster* court determined that the defendants purposely ignored user names and IP addresses, it did not hold Grokster liable for contributory infringement, finding that once Grokster distributed the software, it could not control whether the software will be used for unlawful purposes. n78

IV. RECORDING INDUSTRY'S POST-GROKSTER STRATEGIES

The key difference between *Napster* and *Grokster* is centralized control over user conduct. Grokster's P2P structure prevented centralized control; thus, there was no central Grokster server to indicate which files had been downloaded. n79 While Napster relied on centralized communication architecture to identify available MP3 files, the current generation of P2P programs allows users to search MP3 libraries of others directly through downloaded software with no website involved. n80

Similarly, the court found that Grokster was not vicariously liable. n81 As noted, vicarious infringement extends liability to those who have a right and ability to supervise infringing activity and a direct financial interest in those activities. n82 Knowledge is not a requirement. n83 Although Grokster derived benefit through advertising, it had no control over its product's use. n84 Thus, it lacked the ability to supervise. n85

The *Grokster* decision underscores the importance of control. Without evidence of control over the ability to download copyrighted music, courts will not likely hold a provider liable, regardless of whether it remained ignorant of user activity. Not surprisingly, other operations, like KaZaa and Gnutella, have exploited the de-centralized P2P model. n86

The Court of Appeals for the Ninth Circuit recently upheld the district court's decision in *Grokster*.ⁿ⁸⁷ It appears that P2P sharing, from the application provider's perspective, does not violate anti-infringement laws and that these providers are safe barring an appeal and adverse ruling by the Supreme Court or contrary legislation from Congress. The movie industry currently faces a similar attack, and *Napster* and *Grokster* hold important lessons for Hollywood in its effort to stem movie piracy perpetrated via P2P networks.

In light of the *Grokster* failure, as well as the increase of P2P popularity, the RIAA is now pursuing individual users.ⁿ⁸⁸ In the summer of 2003, the music industry commenced a widespread, yet selective, offensive against individual downloaders.ⁿ⁸⁹ The RIAA has since sued over 1900 users, with more than 400 users paying fines averaging \$ 3000.ⁿ⁹⁰ In March 2004, the RIAA brought an additional 532 lawsuits against anonymous users, including eighty-nine individuals from universities.ⁿ⁹¹ However, the RIAA was recently prohibited from bringing a single action against hundreds of anonymous users.ⁿ⁹² Instead, it must sue individually using the expensive and tedious "John Doe" method.ⁿ⁹³ Despite this setback, the RIAA continues its fight.ⁿ⁹⁴

The RIAA's efforts have moved beyond U.S. borders to Australia, the home of KaZaa.ⁿ⁹⁵ In March 2003, the Music Industry Privacy Investigations unitⁿ⁹⁶ obtained a court order allowing it to raid KaZaa's headquarters and executives' homes.ⁿ⁹⁷ However, the RIAA was told that it could not review the seized documents until the matter resumed in U.S. federal court in the summer of 2004.ⁿ⁹⁸ Nonetheless, while the RIAA continues the lengthy process of building its case, KaZaa remains a popular site for downloading music, though Nielsen/Netratings show that the lawsuit has had an effect on usage.ⁿ⁹⁹

While the recording industry continues to combat the still-existing sites that facilitate e-piracy, record sales continue to decline.ⁿ¹⁰⁰ Although the decline slowed in 2003, retail sales dropped about 4.3%.ⁿ¹⁰¹ One suggested solution to remedy this decline is offering songs online to users at a low price.ⁿ¹⁰² Perhaps this is a wise move considering MP3 player sales have increased 56%.ⁿ¹⁰³

In 2003, Apple launched iTunes, which allows Mac and non-Mac users to download songs for \$ 0.99 each.ⁿ¹⁰⁴ Online music stores like iTunes not only give consumers the option to download only the songs they desire without having to buy an entire album, they allow artists to release individual tracks without releasing a complete album.ⁿ¹⁰⁵ At the conclusion of 2004's first quarter, Apple reported that iTunes sold 50 million songs, with 2.5 million more songs downloaded every week.ⁿ¹⁰⁶ Following iTunes' success, new competitors, including Roxio's Napster and MusicMatch, have entered the fray.ⁿ¹⁰⁷

The RIAA is continuing its campaign to educate users concerning the illegality of downloading pirated music. The message is simple: e-pirates are breaking the law and possibly ruining the music industry, and if consumers stop buying albums, the incentive for creativity evaporates (assuming the traditional album is the only available medium of expression). The RIAA's campaign also emphasizes the effect that losses have not just on artists, executives, and producers, but also on "lesser" industry employees whose names never appear on a marquee.ⁿ¹⁰⁸

The RIAA's efforts appear to be working. According to a July 2004 survey, "64 percent of those surveyed believe it is illegal to make music from the computer available for others to download for free."ⁿ¹⁰⁹ While this figure may indicate a true change in perception, it remains to be seen whether such knowledge equates to any decrease in illegal downloading. Film and music downloading sites and software applications are still quite popular; KaZaa was once downloaded more than 1.9 million times in a single week.ⁿ¹¹⁰

The "education method" may have another important advantage: avoiding the ire of Internet terrorists. In March 2004, the RIAA's website shut down for five days due to a "MyDoom" virus attack.ⁿ¹¹¹ Other attacks have occurred since 2002, when the music industry commenced its robust efforts to combat e-piracy.ⁿ¹¹²

A final novel anti-piracy strategy is "spoofing." Spoofing inundates peer-to-peer networks with fake MP3 files that look exactly like valid files.ⁿ¹¹³ Once downloaded, the user attempts to listen to the music, and the "spoofed" MP3 either plays a damaged recording, an advertisement to buy the track, or nothing.ⁿ¹¹⁴ The hope is that users will become frustrated and deterred from illegally downloading and instead take advantage of new, legal, downloading options. Despite

these efforts, e-piracy continues to be a pervasive problem, and is now approaching the shores of Hollywood in full force.

V. HOLLYWOOD FIGHTS BACK

Though it took some time, high-speed Internet access and e-piracy ingenuity have caught up to the movie industry. Where it was once impractical to download an entire movie, this now can be done much more quickly. n115 Using a dial-up Internet connection, a user can download a movie in twenty-four hours, but a high-speed user can acquire a complete full-feature film in as little as one hour. n116 The question remains whether the music industry's tactics (*i.e.*, litigation, education, and even spoofing) will aid the movie industry's battle to reclaim its annual \$ 3 billion loss to illegal Internet activity. n117 Its first line of defense, encryption, has already been breached.

A. Nightmare on E-Street: DeCSS, DivX, DVD-X and DVD-X Copy

The distribution of digital versatile disks ("DVDs") in the mid-1990s subjected the movie industry to an increased threat of digital piracy. n118 Foreseeing this possibility, DVD technology inventors Toshiba and Matsushita Electric Industrial Co., Ltd., created the Content Scramble System ("CSS"), an encryption coding system designed to prevent copying. n119 Later, the DVD Copy Control Association, Inc., was created to control the licensing of this innovation, but the code was quickly broken. n120

In 1999, Jon Johansen (a.k.a. "DVD Jon"), a Norwegian teen computer hacker, created a decryption code to counter CSS, known as DeCSS. n121 DeCSS enables individuals to copy DVDs to their hard drives, in a manner similar to music downloads. n122 Johansen claimed he developed the code solely for non-infringing purposes, *i.e.*, play-back of already purchased DVDs. n123 He subsequently made the technology available on the web, providing widespread access to digitized movies. n124 Although the widespread availability of DeCSS has sparked litigation spurred by the movie industry, these actions have had seemingly little effect on its disbursement.

After his trial in Norway, urged partially by the Motion Picture Association of America ("MPAA"), n125 Johansen was acquitted of all charges, including charges that DeCSS was an illegal technology and its distribution over the Internet was illegal. n126 Today, this decryption technology is available on nearly one million Internet sites. n127

Adding to the ease of downloading, DivX, a new file compression technology, allows a DVD to fit on a single CD that can be downloaded within hours. n128 DivX was copied from Microsoft by two hackers, and is available through movie downloading sites. n129 Although movie downloading was originally difficult because of time and size, n130 that is no longer the case.

B. Decryption Technology Sparks Litigation

The development and dissemination of DeCSS and DivX subjects the movie industry to rampant piracy. n131 It is estimated that approximately 400,000 to 600,000 movies are downloaded illegally each day. n132 In response, the MPAA, like the RIAA, has attacked DeCSS distributors in court. n133

In two similar cases, *Universal City Studios, Inc. v. Reimerdes* and *Universal City Studios, Inc. v. Corley*, the MPAA sought to enjoin distributors from posting DeCSS and from creating hyperlinks to sites where the software could be obtained. n134 These cases were brought pursuant to the newly enacted DMCA, n135 which explicitly provides that a court "may grant temporary or permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation" n136

Under the DMCA, an effort to "circumvent a technological measure" is defined as an effort "to descramble a scrambled work, decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner." n137 Universal argued that DeCSS fell within the DMCA's purview since it was designed for the sole purpose of descrambling, n138 thus violating the DMCA. n139 Agreeing with Universal, the court in both cases granted injunctions, n140 finding that "DeCSS, a computer program unquestionably within the meaning of the statute . . . is a means of circumventing a technological access control measure," and thus, violates the DMCA. n141

DeCSS distributors responded by challenging the DMCA's validity, asserting their First Amendment free speech right to post DeCSS information on the web. n142 More specifically, in *Reimerdes* and *Corley*, these distributors claimed computer code is a form of expression deserving constitutional protection. n143 Although the court agreed that code is an expression to those able to read it, the court found the restriction (*i.e.*, the injunction) was narrowly tailored so as to not impermissibly infringe on the speaker's constitutional rights. n144

In evaluating this claim, the Court of Appeals for the Second Circuit and the District Court for the Southern District of New York had to first determine whether an injunction would be content-based or content-neutral. n145 A content-based injunction precludes speech based on its substance, whereas a content-neutral injunction precludes speech regardless of substance. n146 The two courts found the injunction on decryption technology to be content-neutral, thus the decision on whether it violated First Amendment rights required the court to balance the distributors' interest in providing the technology against the studio's interest in enjoining the action. n147 Stated differently, the court had to determine whether the injunction restricted no more First Amendment freedoms than necessary to serve a significant government interest (*i.e.*, copyright protection)." n148

Focusing on the DMCA's purpose, the two courts determined that the injunction would not regulate expression, but would regulate DeCSS's function as technology that promotes e-piracy. n149 The *Reimerdes* court accordingly stated that:

as Congress' concerns in enacting the anti-trafficking provision of the DMCA were to suppress copyright piracy and infringement and to promote the availability of copyrighted works in digital form, and not to regulate the expression of ideas that might be inherent in particular anti-circumvention devices or technology, this provision of the statute properly is viewed as content neutral. n150

The court further noted that the consequences of allowing such expression in the digital age would mean that such information could be sent to Internet users all over the world in a short time, thus regulation is necessary to further a substantial government interest. n151

Accordingly, the *Reimerdes* and *Corley* courts, and subsequent decisions, determined that injunctions concerning DeCSS dissemination are content-neutral restrictions necessary to further a substantial government interest, and that the DMCA is sufficiently narrowly tailored to regulate as little speech as necessary. n152 Finally, satisfying the final element in the determination of whether to issue injunctions, the courts found that irreparable harm would result should the injunctions not be issued, primarily for two reasons. n153 First, DeCSS effectively eliminates DVD copyright protection, and thus without an injunction the studio would be forced to either accept piracy or expend resources innovating. n154 Second, the ability to download movies and then transfer and store the media decreases studio revenue. n155

In February 2004, DVD-X and DVD-X COPY, popular decryption programs similar to DeCSS and DivX, were also found to violate the DMCA's anti-circumvention provisions. n156 In *321 Studios v. MGM*, a DVD-X and DVD-X COPY distributor n157 sought a declaration that its product did not violate the DMCA. n158 MGM counterclaimed, seeking the opposite. n159

After citing and discussing *Reimerdes* and *Corley* at length, the court held that the software "avoided" and "bypassed" the DVD encoding scheme, CSS, within the meaning of the DMCA's provision proscribing such circumvention. n160 The court also rejected 321's argument that purchasers had permission to copy DVDs from the producers, n161 and its argument that copying merely constituted fair use. n162 Accordingly, as DVD-X and DVD-X COPY were held to violate the DMCA, the court enjoined 321's distribution of DVD-X and DVD-X COPY, and ordered that the company stop manufacturing, distributing, or otherwise trafficking DVD circumvention software within seven days of its February 19, 2004, order. n163

Despite the *Reimerdes*, *Corley* and *321 Studio* rulings, it appears e-pirates have not been deterred. As history has shown, once the "genie is out" (or once millions of copies of DeCSS, DivX, DVD-X and DVD-X COPY are themselves available for illegal download), it is nearly impossible to wrestle back into the lamp. n164 Hollywood must find other ways to fight e-piracy.

C. Preventive Measures

To prevent losses resulting from premature dissemination of potential hit movies, studios are taking drastic measures. n165 In an effort to stop Tom Cruise's latest film, *The Last Samurai*, from making its way to the Internet before the sneak preview, Warner Brothers hand-delivered copies to projection rooms, searched theaters for recording devices, installed metal detectors, searched for and seized cameras and camera phones, and hired staff to walk the aisles with night-vision goggles. n166 Though drastic, these measures proved effective -- somewhat. Just days after its theatrical release, bootleg copies began surfacing on the web. n167

Warner Brothers investigated and determined that the copy was filmed via camcorder in a U.S. theater. n168 An embedded tracking code indicated the theater from which it originated, but the studio released no specific information. n169 Nonetheless, *The Last Samurai's* release was a success; however, as Warner Brothers later emphasized, its early web availability indicates how pervasive e-piracy has become. n170 Moreover, the studio's protective efforts underscore the frightening speed and efficiency with which movies can find their way to the web. n171

It is estimated that Hollywood lost \$ 3.5 billion to illegal DVD downloading in 2003. n172 This loss is projected to increase to \$ 5.4 billion this year as the industry faces further technological development, which is rapidly diminishing the time it takes to download a movie. n173 Relatedly, blank CD sales in 2001 were up 40% from the previous year, indicating that blank CD demand has grown along with increased downloading capabilities. n174

Despite technological "advances," many of those engaged in movie piracy feel that Hollywood has little to lose from this illegal downloading compared to the effects endured by the recording industry. n175 However, with the continual improvement of downloading technology, Hollywood studios will soon face the same problems. n176 Hollywood should take action now, perhaps something similar to the recording industry's remedial measures, to prevent the same lost revenues faced by the recording industry. n177 As discussed, the measures include litigation, education, and "spoofing," or lesser explored methods which espouse (rather than combat) the technology. n178 However, Hollywood must also look to the enemy within. n179

D. The Enemy Within - *Oscar TM* Implicated

An AT&T study published on September 13, 2003, *Analysis of Security Vulnerabilities in the Movie Production and Distribution Process*, examined the top fifty films in U.S. theaters that appeared online between January 1, 2002, and June 27, 2003. n180 The report evaluated web versions of movies, analyzing both sound and picture quality, as well as other effects of illegal copying and downloading. n181 Further, the report examined the dates when movies first appeared online in comparison with theatrical and home DVD/video release dates. n182 The report then hypothesized as to the online copies' origins. n183

The study found that 77% of illegal copies originated within the industry, seven films appeared on the Internet prior to their theatrical release date, and 163 were available before the DVD/video release date. n184 The study also identified time periods when most leaks occurred: the two-week period surrounding the movie's theatrical release and the three-week period leading to DVD/video release. n185

The results were shocking; the most privileged members of the film industry were perhaps its biggest threat. But with a materialized threat comes an acquirable target. In early 2004, the FBI made its first movie bootlegging arrest. n186 The twist--the accused, Russell William Sprague, received "screeners" from actor and Academy of Motion Pictures Arts and Sciences ("the Academy") member Carmine Caridi. n187 The movies Caridi sent Sprague included *The Last Samurai*, *Something's Gotta Give*, and *Big Fish*. n188 Caridi sent the movies to Sprague, who copied them to DVD and returned the original movies to Caridi. n189

Last year, in anticipation of bootlegging, the MPAA banned screener DVDs. n190 However, the ban was lifted after a court granted a temporary injunction to independent production companies that claimed the ban left them disadvantaged because their movies are not widely distributed. n191 In response, the Academy now requires *Oscar TM* voters to agree to keep the screeners for their private viewing, threatening expulsion from the Academy as a consequence for a violation. n192

E. If you can't beat 'em, join 'em - Hollywood Goes On-Line

To combat e-piracy and cash-in on the Internet, Hollywood has entered the online marketplace. n193 One distributor, Movielink, offers downloadable movies to pay-per-view members for \$ 4-\$ 5. n194 Once a user chooses a movie, he can view it at any point during the next thirty days, but once the file is opened, it must be watched within twenty-four hours or it will be automatically deleted. n195 In addition, the downloaded film is encrypted n196 to prevent a customer from burning the movie to DVD.

The industry must now consider whether this alternative will convert current *illegal* downloaders. Today, a movie can be downloaded in hours, for free, and burned onto DVD before it is in theaters. n197 While such acts are illegal, the movie industry, unlike the music industry, has yet to prosecute illegal downloaders or create effective and profitable online alternatives. For the time being there appears to be nothing stopping e-pirates from taking advantage of free movies. The only advantage to the "legal" on-line consumer over using a pay-per-view service is an earlier release date. Thus, Movielink and others may find themselves in direct competition with video stores, while offering little benefit to traditional movie rental (other than not having to leave one's house). n198

Other "for-pay services" have entered the online market. However, the services available continue to restrict what members can do with the media. n199 To keep pace with illegal downloading, the music and movie industries must create better pay services.

F. Education - "Movies: They're Worth It"

In an effort to avoid the declining sales faced by the recording industry, the MPAA is striving to educate consumers about the effects of illegally downloading movies. n200 Such efforts include the creation of two MPAA websites, www.respectcopyrights.org and www.mpa.com/anti-piracy, and various trailers shown at theaters portraying e-piracy's collateral effects. n201

The MPAA's site, www.respectcopyrights.org, covers four effects of illegal movie downloading: direct harm to consumers if movies fail to make money, the effect movie decline will have on off-screen employees, computer vulnerability, and criminal risk. n202

i. You are cheating yourself!

First, the MPAA highlights the effects on the consumer. n203 The MPAA claims bootlegged movies lack quality, since they are often recorded by a camcorder. n204 Poor quality, the MPAA believes, should deter illegal downloading since the movie loses the "real movie experience." n205

Moreover, if illegal downloading continues, fewer people will go to the movies and the number of profitable movies will decline. n206 As a result, studios will be forced to make fewer films, which, in turn, will harm consumer options. n207 Even now, according to the MPAA, only four out of every ten films make a profit. n208

This sympathy-garnering effort, from an industry earning billions of dollars a year, appears to be receiving only a lukewarm reception. It is suggested that while users might agree that studios could stop making movies to cover their losses, studios will lack sympathy from consumers as long as top stars continue to earn millions of dollars per film.

ii. You are threatening the livelihood of thousands!

As the MPAA suggests, people other than actors, directors and producers are involved in the movie-making process. n209 Although illegal downloading may not be deterred by the studios or the major players--actors, executives and directors--losing money, the MPAA hopes that for the harm e-piracy causes, consumers will appreciate that workers behind-the-scenes are at risk. n210

Accordingly, the MPAA has produced several theatrical trailers, exhibiting various behind-the-scene workers discussing their jobs and the effects movie piracy will have on themselves and over 500,000 others in the field if illegal download-

ing continues. n211 These workers include a stunt man, a set painter, and a make-up artist. n212 Obviously, these trailers are another attempt to garner sympathy from consumers who may otherwise feel justified in downloading movies, considering the fortunes made by some in the industry. The trailers' effects remain to be seen.

iii. Your computer is vulnerable!

Movie downloading, like music downloading, can be accomplished through P2P networking. n213 Though convenient and free, P2P networking has risks, including virus and worm susceptibility. n214 Personal information, such as bank records and social security numbers, may be compromised. n215 Also, once a user downloads a file, he may himself, perhaps unknowingly, become a pirated movie distributor and expose himself to civil and criminal liability. n216

This fear factor, however, is unlikely to be a deterrent. Arguably, users know the risk of viruses and worms, but accept it by merely logging onto the web everyday. If Hollywood continues to be uncommitted to prosecuting violators civilly and criminally, its empty admonitions will continue to fall on deaf ears.

iv. You are breaking the law!

If caught, an e-pirate is subject to stiff penalties and fines; possibly years in prison and thousands of dollars in fines. n217 However, there is not yet a set precedent for enforcement of pirated movies that would lead individuals to believe such conduct has real consequences.

In addition to the MPAA's four claimed effects, www.respectcopyrights.org also includes information regarding a new campaign sponsored by the MPAA and headed by Junior Achievement, Inc., entitled *What's the Diff?*, which is available to middle school students. n218 Its purpose is to educate young people about the need to protect copyrights and to attach a stigma to illegal downloading. n219 The MPAA also provides links to profit-making websites where users can download movies legally, for a fee, including Cinemanow, Ifilm, Movieflix, and Movielink. n220

VI. RECENT E-PIRACY LEGISLATION

The MPAA currently backs proposed legislation designed to impose strict penalties on e-piracy. n221 One proposal, an expansion of the No Electronic Theft Act, the Artists' Rights and Theft Prevention Act ("ARTPA"), would increase fines and prison sentences. n222 ARTPA specifically imposes harsher penalties on those who create or obtain movies prior to their theatrical release. n223 Hollywood's profits come from a carefully choreographed timing of distribution of the film across a variety of media, anchored by a film's theatrical release; thus, the incentive to curb illegal pre-release dissemination. n224

Additionally, "starting in July 2005, all digital video-recording devices--including digital VCRs and digital tuners--will recognize a 'broadcast flag' encoded in the digital television stream. Recorders must then encode a flagged program so it cannot be shared from machine to machine or over the Internet." n225 This regulation is partially aimed at curbing the MPAA's problem of illegal redistribution of broadcast television. n226 For now, the MPAA backs the federal regulation, but opponents suggest the measures are constitutionally over inclusive and could include benign activities such as taping a show for a friend. n227 Finally, the proposed Piracy Deterrence and Education Act, would "ban unauthorized recording in movie theaters and includes harsh penalties if pre-released movies are swapped on P2P networks." n228

VII. RECENT LITIGATION -- *RIAA V. VERIZON INTERNET SERVICES, INC.*

To pursue apparent copyright infringers, the RIAA must individually identify the users using P2P programs who share and trade files. n229 The RIAA can easily find a user's screen name and trace the user to his ISP with his associated IP address. n230 But only the ISP can link the IP with a name and address. Once the link is made, the RIAA can contact, or even sue, the person. n231

Prior to *Verizon*, the RIAA frequently used the DMCA's subpoena provision n232 to "compel ISPs to disclose the names of subscribers whom the RIAA believed were infringing its members' copyrights." n233 Some ISPs complied with the RIAA's subpoenas and identified subscribers' names, and using the acquired information, the RIAA sent letters to and filed lawsuits against several hundred infringing individuals, "each of whom allegedly made available for download hundreds or in some cases thousands of .mp3 files." n234 One such targeted ISP was Verizon Internet Ser-

vices. Verizon, however, drew a line in the sand, and in the summer of 2002 refused to comply with an RIAA subpoena. n235

In defending its actions, Verizon argued that the DMCA precludes issuance of subpoenas to ISPs that merely act as conduits for P2P communications, since the subpoena request could not meet the requirement that such subpoenas contain "a copy of a notification [of claimed infringement, as] described in § 512(c)(3)(A)." n236 In particular, Verizon maintained that the RIAA's two subpoenas did not meet the requirements since Verizon is not storing the infringing material on its server, and it could not identify material "to be removed or access to which is to be disabled." n237 Since § 512(h)(4) makes satisfaction of the notification requirement a condition precedent to issuance, Verizon's argument continued, the subpoenas were deficient. n238

The Court of Appeals for the District of Columbia Circuit, following the *Napster* and *Grokster* logic, agreed with Verizon and held that DMCA subpoenas may only be issued to ISPs engaged in storing infringing material, and not to those merely acting as conduits. n239 As the court explained, the subpoena validity depends upon the copyright holder having given the ISP effective notification under § 512(c)(3)(A). n240 Thus, a subpoena may not be issued to a provider acting as a conduit for P2P sharing, which does not involve media storage. n241

As the court sympathetically noted, the problem for the RIAA (and presumably the MPAA) lies in the language of the DMCA itself. n242 Congress did not likely foresee the application of § 512 to P2P file sharing when the DMCA was drafted, and had it foreseen P2P's development, it may have drafted the DMCA more broadly. n243 For the time being, however, issuance of § 512 subpoenas to an ISP acting as a P2P conduit is barred. n244

Hollywood is losing its war against P2P conduits on two fronts. According to *Grokster*, ISP activities that facilitate P2P sharing are lawful n245 and, according to *Verizon*, their IP lists are secure. n246 So what now for Hollywood? Wait for Congress to act? Perhaps, such action was all but urged by the *Verizon* court:

The stakes are large for the music, motion picture, and software industries and their role in fostering technological innovation and our popular culture. It is not surprising, therefore, that even as this case was being argued [September 16, 2003], committees of the Congress were considering how best to deal with the threat to copyrights posed by P2P file sharing schemes. n247

Unfortunately, Congressional action will always be a step behind technological innovation. Rather, Hollywood must stop sailing against the wind and view the Internet for what it is: an opportunity. Hollywood must continue its educational efforts and provide superior online alternatives to illegal downloading, or hope that Congress acts to protect its shores. It must become the innovator.

VIII. CONCLUSION AND RECOMMENDATIONS - HIDDEN TREASURE

To date, Hollywood's efforts to fight illegal downloading have not matched those of the recording industry--perhaps a wise move. It is difficult to foresee whether, and to what extent, the recording industry's litigation efforts will pay off. What is apparent is the increasing popularity of legal music and movie downloading operations, perhaps a result of the recording industry and Hollywood's education efforts. For example, Apple's iTunes has sold millions of songs, and other competitors are entering the market. n248 Also, a recent report indicated that traditional music sales were up 9.1% over the first three months of 2004, compared with the first three months of 2003. n249

Unlike the recording industry, Hollywood's main focus appears to be consumer education. On June 14, 2004, the MPAA announced that it was launching a new phase of "aggressive education" concerning movie piracy. n250 According to an MPAA press release:

The new phase will feature ads in daily newspapers and consumer magazines across the country, as well as in more than 100 college newspapers. It will also include reaching out to parents, students and local groups to explain why movie piracy is illegal, how it impacts jobs and the economy and the consequences of engaging in illegal trafficking. Additionally, in the coming months, anti-piracy messages will appear in motion picture theaters across the country. n251

MPAA president Jack Valenti further noted:

We hope this ramped-up information/educational campaign will cause those who are taking films without permission to stop their illegal activity. But we will keep all of our options open, including legal action. If we don't react promptly to an ascending curve of illegal uploading and downloading soon to be reinforced with dazzling speeds rising from file-trafficking networks, we will live with an intense regret. We have to do more to convince that minority of people who are engaged in this unlawful and infringing activity of the wrongness of their conduct. We have to stem the tide of film theft online before it is too late, before it puts to peril the creative energy of the industry and the jobs of the nearly one million Americans who work within the movie industry. n252

Valenti is correct; hackers and e-pirates will continue to circumvent and distribute. But he may be incorrect about stemming the tide before it is too late--it may be too late. As mentioned previously, 400,000 to 600,000 movies are illegally downloaded each day, and 39% of all adult Internet users (24% of all adult Americans) have high-speed Internet access at home. n253

Along with its educational efforts, Hollywood must focus on capitalizing on the Internet's potential, perhaps using iTunes as a model. It is still unclear whether users will be affected by trailer warnings concerning illegal downloading, but consumers will always be interested in receiving a superior product. Hollywood, however, must address its continuing inability to release online movies sooner and concentrate on education as well as capitalization. With such access and seemingly ineffective litigation efforts, the MPAA's difficulty in deterring illegal downloading is not surprising. Thus, Hollywood must remain focused on both education and capitalization.

To capitalize on the online phenomenon, Hollywood must innovate and distribute faster, must offer better services, and should not waste valuable resources and damage public goodwill by pursuing e-pirates in court. So far the MPAA has wisely refused to join the legal offensive, perhaps hoping to reap the benefits associated with high-profile music lawsuits without having to take the heat from outraged parents and consumers. n254 This decision may be doubly wise since *Verizon*, as Hollywood would now find great difficulty in acquiring large numbers of individual targets for infringement lawsuits. n255 If Hollywood wishes to litigate, however, it should attack those responsible for the initial dissemination: the scrupulous insiders discussed above.

Meanwhile, while Hollywood refuses to modernize and capitalize on the goldmine at their fingertips, technology continues to decrease download time, and the number of computers flying the Jolly Roger grows.

Legal Topics:

For related research and practice materials, see the following legal topics:

Communications Law
Related Legal Issues
Copyright
Computer & Internet Law
Copyright Protection
Civil Infringement Actions
General Overview
Copyright Law
Civil Infringement Actions
Infringement Online
General Overview

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n3 Amanda Ripley, *Hollywood Robbery: How Does a Hit Movie Go from the Free Market to the Black Market?* Time Retraces the Trail, TIME, Jan. 26, 2004, at 56.

n4 17 U.S.C. §§ 101-810 (2000).

n5 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

n6 Recording Indus. Ass'n of Am. v. Verizon Internet Servs. Inc., 351 F.3d 1229, 1231 (D.C. Cir. 2003).

n7 See Lev Grossman, *It's All Free!; Music! Movies! TV shows! Millions of People Download Them Every Day. Is Digital Piracy Killing the Entertainment Industry?*, TIME, May 5, 2003, at 60, 60-63.

n8 Ripley, *supra* note 3, at 56; *Study: Music Piracy Has 5 Years of Growth*, CHI. TRIB., Sept. 23, 2003, at 12.

n9 See Matthew C. Mousley, Note, *Peer-to-Peer Combat: The Entertainment Industry's Arsenal in its War on Digital Piracy*, 48 VILL. L. REV. 667, 674 (2003).

n10 See generally 17 U.S.C. § 506(a) (2000) (includes criminal offenses, specifically criminal infringement); 17 U.S.C. § 1201 (2000) (includes circumvention of copyright protection systems).

n11 See generally A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004).

n12 Christian John Pantages, *Avast Ye, Hollywood! Digital Motion Picture Piracy Comes of Age*, 15 TRANSNAT'L LAW 155, 163 (Winter 2002).

n13 Larry Dobrow, *Broadband Growth Numbers Spur Contention* (August 6, 2004), at http://www.mediapost.com/dtts_dsp_news.cfm?cb=050942P&newsID=263077&newsDate=08/06/2004 (last visited October 3, 2004).

n14 Beatrice E. Garcia, *More Users Surfing Web at High Speed*, MIAMI HERALD, May 19, 2003, at 3A, available at <http://www.siliconvalley.com/mld/siliconvalley/5892656.htm?template=contentModules/printstory.jsp>.

n15 Press Release, Motion Picture Association of America, MPAA Launches New Phase of Aggressive Education Campaign Against Movie Piracy (June 15, 2004), at http://www.respectcopyrights.com/FINAL_6-15-04_STOPP_%20Press_Release.doc.

n16 See Tom Hays, *Cop Shooting Casts Light on Piracy Battle* (June 19, 2004), at <http://www.infoshop.org/inews/stories.php?story=04/06/21/1528235>.

n17 See generally Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004) (granting defendant software vendors' motions for summary judgment on claims of copyright infringement).

n18 U.S. CONST. art. I, § 8, cl. 8.

n19 17 U.S.C. § 302(a) (2000).

n20 *Id.* § 106 (listing the exclusive rights of copyright owners).

n21 *Id.* § 501(b).

n22 *Id.* § 506; 18 U.S.C. § 2319 (2000).

n23 17 U.S.C. §§ 107-08 (2000).

n24 Mousley, *supra* note 9, at 678.

n25 *See* 17 U.S.C. § 505(a).

n26 Mousley, *supra* note 9, at 678.

n27 Pub. L. No. 105-304, 1122 Stat. 2680 (1998) (codified as amended in scattered sections of 17 U.S.C.)

n28 *See* Mousley, *supra* note 9, at 679.

n29 World Intellectual Property Organization: Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65; *see also* 321 Studios v. Metro-Goldwyn-Mayer, Inc., 307 F. Supp. 2d 1085, 1093-94 (N.D. Cal. 2004).

n30 Mousley, *supra* note 9, at 680.

n31 17 U.S.C. § 1201(a)(1)(A) (2000); *see also* Mousley, *supra* note 9, at 679.

n32 17 U.S.C. § 1201(a)(2)(A) (2000); *see also* Mousley, *supra* note 9, at 679.

n33 § 1204(a)(2); *see also* Mousley, *supra* note 9, at 679.

n34 *See* Mousley, *supra* note 9, at 680 (discussing criticism and consumer group opponents of the DMCA).

n35 17 U.S.C. § 512(h) (2000); *see also* Recording Indus. Ass'n of Am. v. Verizon Internet Servs. Inc., 351 F.3d 1229 (D.C. Cir. 2003) (holding that a subpoena could be issued only to an ISP engaged in storing on its servers material that was infringing or the subject of infringing activity, and not to a mere conduit ISP).

n36 *See generally* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (granting preliminary injunction and preliminarily enjoining defendant from enabling Internet users to copy, download and distribute copyrighted music); *see also* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004) (denying plaintiffs' actions for copyright infringement against defendants software vendors due to lack of control over networks and infringing use of users).

n37 *Napster*, 239 F.3d at 1004.

n38 *See id.* at 1012.

n39 *Id.*

n40 *Id.*

n41 *Id.*

n42 *Id.* at 1019.

n43 *Id.*

n44 *Id.* at 1019-20.

n45 *Id.* at 1020.

n46 *Id.*

n47 *Id.*

n48 *Id.*

n49 *Id.* at 1021-22.

n50 *Id.* at 1022.

n51 *Id.*

n52 *Id.* at 1023.

n53 *Id.*

n54 *Id.*

n55 *See id.* at 1020, 1023.

n56 *Id.* at 1023.

n57 *Id.* at 1024.

n58 *Id.* at 1014.

n59 17 U.S.C. § 107 (2000).

n60 *Napster*, 239 F.3d at 1014.

n61 *Id.* at 1015.

n62 *Id.*

n63 *Id.* at 1016.

n64 *Id.* at 1029.

n65 *Id.*

n66 BBC News, *Metallica Joins New Napster Attack* (Mar. 29, 2001), at http://news.bbc.co.uk/1/hi/entertainment/new_media/1249347.stm (last visited June 21, 2004).

n67 Associated Press, *Napster Still Offline* (July 21, 2001), available at <http://www.cbsnews.com/stories/2001/07/12/tech/main301149.shtml>.

n68 Michael Singer, *Napster Joins MusicNet Service* (June 6, 2001), at <http://www.Internetnews.com/ec-news/article.php/77981> (last visited June 21, 2004).

n69 Michael Singer, *Napster Sold for \$ 8 Million* (May 17, 2002), at <http://siliconvalley.Internet.com/news/article.php/1140801> (last visited June 21, 2004).

n70 *Grokster*, 259 F. Supp. 2d at 1029.

n71 *Id.*

n72 *Id.* at 1032.

n73 *Id.* at 1040.

n74 *Id.*

n75 *Grokster*, 259 F. Supp. 2d at 1045.

n76 *See id.*

n77 *Id.* at 1041.

n78 *Id.* at 1043.

n79 *Id.* at 1040.

n80 Recording Indus. Ass'n of Am. v. Verizon Internet Servs. Inc., 351 F.3d 1229, 1232 (D.C. Cir. 2003) (citing Douglas Litchman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 403, 408-09 (2003)).

n81 *Grokster*, 259 F. Supp. 2d at 1043.

n82 *Id.* (citing *Napster*, 239 F.3d at 1022).

n83 *Id.* (citing *Adobe Sys., Inc. v. Canus Prods., Inc.*, 173 F. Supp. 2d 1044, 1049 (C.D. Cal. 2001)).

n84 *Id.* at 1044-45.

n85 *Id.* at 1045-46.

n86 *See* Grossman, *supra* note 7, at 60.

n87 *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

n88 John Borland, *New RIAA File-swapping Suits Filed*, CNET News, (Mar. 23, 2004), at <http://news.com.com/2100-1027-5177933.html>.

n89 Nick Wingfield & Ethan Smith, *The High Cost of Sharing*, WALL ST. J., Sept. 9, 2003, at B1.

n90 Borland, *supra* note 88.

n91 *Id.*

n92 *Id.*

n93 *Id.*

n94 *Id.*

n95 Abby Dinham, *Sharman May Appeal Court Ruling*, CNET News, (Mar. 4, 2004), at <http://news.com.com/2100-1027-5170198.html>

n96 The MIPI is run by the Australian Recording Industry Association to oversee all music piracy issues in the music industry. Australian Competition and Consumer Commission, *Music Industry Piracy Investigations: Description*, at <http://www.accc.gov.au/content/index.phpml/itemId/288585/fromItemId/340639> (last visited Sept. 4, 2004).

n97 Sam Varghese, *Kazaa Case: Access to Seized Materials Delayed*, The Age, (Mar. 24, 2004), at <http://www.theage.com.au/articles/2004/03/24/1079939686550.html>

n98 *Id.*

n99 "The Kazaa software, the most popular file-trading application, also saw usage fall 15 percent, from 6.5 million to 5.5 million unique users [the week ending June 29, 2004], according to Neilson/Netratings." John Borland, *RIAA Threat May Be Slowing File Swapping*, CNET News, (July 14, 2003), at http://news.com.com/RIAA+threat+may+be+slowing+file+swapping/2100-1027_3-1025684.html.

n100 John Borland, *Record Sales Down, But Seen as Stabilizing*, CNET News, (Mar. 4, 2004), at <http://news.com.com/2110-1027-5169904.html>.

n101 *Id.*

n102 *See id.*

n103 *See* Grossman, *supra* note 7, at 64.

n104 Leander Kahney, *Apple Launches Paid Music Service*, (Apr. 28, 2003), at <http://www.wired.com/news/business/0,1367,58656,00.html>.

n105 *Id.*

n106 *See* Ina Fried, *Apple's iTunes Sales Hit 50 Million*, (Mar. 15, 2004), at http://news.com.com/2100-1027_3-5173115.html.

n107 *Id.*

n108 *See generally* Motion Picture Association of America, *supra* note 15.

n109 Grant Gross, *RIAA Files 896 New File-Trading Lawsuits*, (Aug. 25, 2004), at <http://www.thestandard.com/article.php/20040825203958223>.

n110 John Borland, *New RIAA File-Swapping Suits Filed*, (Mar. 23, 2004), at http://zdnet.com.com/2100-1104_2-5177933.html.

n111 Alex Viega, *Recording Industry Web Site Apparently Downed for Five Days by Virus*, DETROIT NEWS, (Mar. 23, 2004), at <http://www.detnews.com/2004/technology/0403/24/technology-99755.htm>.

n112 *Id.*

n113 Katie Dean, *Academics Patent P2P Spoofing*, WIRED NEWS, (May 8, 2004), at <http://www.wired.com/news/digiwood/0,1412,63384,00.html>.

n114 *Id.*

n115 *See* Pantages, *supra* note 12, at 156; Ted Greenwald, *Decoding the Codes*, WIRED MAG., (Aug. 1999), available at <http://www.wired.com/wired/archive/7.08/codecs.html> (explaining methods of quicker downloading).

n116 *See* Pantages, *supra* note 12, at 156.

n117 Motion Picture Association of America, Statement on Anti-Piracy, at <http://www.mpaa.org/anti-piracy/index.htm> (last visited Sept. 21, 2004).

n118 Pantages, *supra* note 12, at 162-63.

n119 DVD Copy Control Ass'n. v. Bunner, 75 P.3d 1, 6 (Cal. 2003), *rev'd*, 10 Cal. Rptr. 3d 185 (Cal. Ct. App. 2004).

n120 *Bunner*, 75 P.3d at 7.

n121 *Id.*

n122 Pantages, *supra* note 12, at 163.

n123 *See generally* John Leyden, *DVD Jon Is Free - Official*, THE REGISTER (Jan. 7, 2003) (discussing the holding of the Norwegian court on the charges filed by the Norwegian Economic Crime Unit against Jon Johansen for producing the DeCSS DVD decryption utility), at <http://www.theregister.co.uk/content/4/28749.html>.

n124 *See Bunner*, 75 P.3d at 7 (discussing the posting of the DeCSS software by Jon Johansen on the Internet to enable users to distribute movies).

n125 The Motion Picture Association of America, Inc. (MPAA) serves as the voice and advocate of the American motion picture, home video and television industries from its offices in Los Angeles and Washington, D.C. These members include Buena Vista Pictures Distribution, Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal Studios, and Warner Bros. Entertainment, Inc. *See generally* Motion Picture Association of America, *supra* note 15.

n126 Leyden, *supra* note 123.

n127 Pantages, *supra* note 12, at 164.

n128 *Id.*

n129 *Id.* at 164-65.

n130 *Id.* at 162.

n131 *Id.* at 165.

n132 Grossman, *supra* note 7, at 60.

n133 *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

n134 *See Corley*, 273 F.3d at 429; *Reimerdes*, 111 F. Supp. 2d at 294.

n135 *See* 273 F.3d at 429; 111 F. Supp. 2d at 294.

n136 17 U.S.C. § 1203(b)(1) (2000).

n137 17 U.S.C. § 1201(a)(3)(A) (2000).

n138 *Reimerdes*, 111 F. Supp. 2d at 319.

n139 *Id.*

n140 *See* 273 F.3d at 429; 111 F. Supp. 2d at 294.

n141 111 F. Supp. 2d at 317.

n142 *See generally Corley*, 273 F.3d at 429; *Reimerdes*, 111 F. Supp. 2d at 294.

n143 *Corley*, 273 F.3d at 436; *Reimerdes*, 111 F. Supp. 2d at 304.

n144 *Corley*, 273 F.3d at 455; *Reimerdes*, 111 F. Supp. 2d at 330.

n145 *Reimerdes*, 111 F. Supp. 2d at 327; *see also Corley*, 273 F.3d at 450.

n146 *Reimerdes*, 111 F. Supp. 2d at 327.

n147 *See generally Corley*, 273 F.3d at 454.

n148 *Reimerdes*, 111 F. Supp. 2d. at 327-28.

n149 *Reimerdes*, 111 F. Supp. 2d at 329.

n150 *Id.*

n151 *Id.* at 331.

n152 *See generally Corley*, 273 F.3d at 429; *Reimerdes*, 111 F. Supp. 2d at 294.

n153 *Reimerdes*, 111 F. Supp. 2d at 315.

n154 *Id.*

n155 *Id.*

n156 321 Studios v. Metro-Goldwyn-Mayer, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

n157 321 Studios is no stranger to controversy. Hollywood has had it under scrutiny since the 2001 launch of its first product, DVD Copy Plus, which makes lesser-quality CD copies of DVD movies. In April [of 2002], fearing the MPAA's wrath, 321 Studios preemptively sued nine major Hollywood movie studios. The suit asks the court to rule that selling DVD Copy Plus does not violate the DMCA. Tom Spring, *New Tool Makes DVD Copying Easy; 321 Studios Challenges Hollywood, DMCA Again with Release of DVD X Copy*, PC WORLD (Dec. 3, 2002), available at <http://www.pcworld.com/news/article/0%2Caid%2C107637%2C00.asp> (last visited Sept. 4, 2004).

n158 321 Studios, 307 F. Supp. 2d at 1089-90.

n159 *Id.*

n160 *Id.* at 1098; 17 U.S.C. § 1201(b)(1).

n161 321, 307 F. Supp. 2d at 1096.

n162 *Id.* at 1101-02.

n163 *Id.* at 1105.

n164 See Grossman, *supra* note 7, at 61.

n165 Ripley, *supra* note 3.

n166 *Id.*

n167 *Id.* at 58.

n168 *Id.*

n169 *Id.*

n170 *Id.* at 57.

n171 *Id.*

n172 *Id.*

n173 *Id.*

n174 Grossman, *supra* note 7, at 61.

n175 Ripley, *supra* note 3.

n176 *Id.*

n177 *Id.*

n178 Grossman, *supra* note 7, at 62.

n179 Ripley, *supra* note 3, at 59.

n180 Simon Byers et al., *Analysis of Security Vulnerabilities in the Movie Production and Distribution Process* 7, (Sept. 13, 2003), at <http://lorrie.cranor.org/pubs/drm03-r.pdf>.

n181 *Id.* at 8.

n182 *Id.* at 8.

n183 *Id.* at 9.

n184 *Id.* at 9.

n185 *See id.* at 10.

n186 Linda Massarella, *FBI Makes Arrest in Internet Piracy Case*, USA TODAY, Jan. 23, 2004, available at http://www.usatoday.com/tech/news/2004-01-23-film-piracy-bust_x.htm.

n187 *Id.*

n188 *Id.*

n189 *Id.*

n190 *Id.*

n191 *Id.*

n192 Massarella, *supra* note 186.

n193 *See generally* Katherine L. Race, *The Future of Digital Movie Distribution on the Internet Antitrust Concerns with the Movielink and Movies.com Proposals*, 29 RUTGERS COMPUTER & TECH. L.J. 89 (2003) (discussing movie studios' plans to offer digitized movies on the Internet for paying customers).

n194 *Id.* at 92.

n195 *Id.*

n196 *Id.*

n197 *See* Grossman, *supra* note 7, at 60.

n198 *See* Race, *supra* note 193, at 92-93.

n199 Grossman, *supra* note 7, at 64.

n200 *See* Motion Picture Association of America, Statement on Anti-Piracy, at <http://www.mpaa.org/anti-piracy/index.htm> (last visited Sept. 21, 2004); *see also* Press Release, Motion Picture Association of America, MPAA Launches New Phase of Aggressive Education Campaign Against Movie Piracy (June 15, 2004), at http://www.respectcopyrights.com/FINAL_6-15-04_STOPP_%20Press_Release.doc.

n201 *See supra* note 200.

n202 *Id.*

n203 *Id.*

n204 *Id.*

n205 *Id.*

n206 *Id.*

n207 *Id.*

n208 *Id.*

n209 *Id.*

n210 *Id.*

n211 *Id.*

n212 *Id.*

n213 *Id.*

n214 *Id.*

n215 *Id.*

n216 *Id.*

n217 *Id.*

n218 JUNIOR ACHIEVEMENT INC. & MOTION PICTURE ASS'N OF AM., WHAT'S THE DIFF? (2003) at http://www.respectcopyrights.org/CG_FINAL.pdf (last visited Oct. 5, 2004).

n219 *See id.* at 2.

n220 Motion Picture Association of America., *supra* note 15.

n221 *See* Ryan Singel, *Calls to Burn Broadcast Flag*, WIRED NEWS (Mar. 11, 2004), at <http://www.wired.com/news/politics/0,1283,62619,00.html>; *see also* *Movie Piracy: New Movie Piracy Bill Ups the Ante Considerably*, at http://server1.msn.co.in/Computing/antipiracy/new_movie_piracy.html (last visited Sept. 2, 2004).

n222 *See* *Movie Piracy*, *supra* note 221.

n223 *Id.*

n224 *Id.*

n225 *See* Singel, *supra* note 221.

n226 *Id.*

n227 *Id.*

n228 Declan McCullagh, *House Panel Approves Copyright Bill*, CNET News (Mar. 31, 2004), at <http://news.com.com/2100-1028-5182898.html>.

n229 *See Verizon*, 351 F.3d at 1232.

n230 *Id.*

n231 *Id.*

n232 17 U.S.C. § 512(h)(1) (2000) (copyright owner may "request the clerk of any United States district court to issue a subpoena to [an ISP] for identification of an alleged infringer").

n233 *Verizon*, 351 F.3d at 1232.

n234 *Id.*

n235 *Id.*

n236 *Id.* at 1234.

n237 *Id.* at 1235.

n238 *Id.* at 1234-36.

n239 *Id.* at 1236-38.

n240 *Id.* at 1236.

n241 *Id.* at 1236-37.

n242 *Id.* at 1238.

n243 *Id.*

n244 *Id.*

n245 *See generally Grokster*, 259 F. Supp. 2d at 1029.

n246 *See generally Verizon*, 351 F.3d at 1229.

n247 *Id.* at 1238-39.

n248 Fried, *supra* note 105.

n249 Alex Veiga, *Music Sales Strong Despite Digital Piracy*, (Apr. 12, 2004), at <http://www.phillyburbs.com/pb-dyn/news/81-04122004-281107.html>.

n250 Motion Picture Association of America, *supra* note 15.

n251 *Id.*

n252 *Id.*

n253 *Id.*

n254 Patrick Goldstein, *The Big Picture Patrick Goldstein; Hollywood Deals with Piracy, A Wary Eye on CDs*, L.A. TIMES, Sept. 9, 2003, at E1, available at 2003 WL 2433042.

n255 *See generally Verizon*, 351 F.3d at 1229.